Supreme Court, U.S.
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No. 06-___

IN THE

Supreme Court of the United States

BERNARD GURR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the indictment and trial of a defendant in Washington, D.C., for a crime committed entirely within American Samoa violates the Sixth Amendment's guarantee of a trial by a jury of one's peers in the district in which the crime was allegedly committed.

2. Whether such an indictment and trial is a violation of federal statute directing that a criminal trial shall take place in the district where the alleged crime occurred.

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Bernard Gurr respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App. 1a) is reported at 471 F.3d 144. The Court of Appeals' order denying a petition for rehearing *en banc* is unreported and reproduced in the appendix. (App. 19a.) The U.S. District Court for the District of Columbia did not issue a written decision on Mr. Gurr's motion to dismiss the indictment.

JURISDICTION

The judgment of the Court of Appeals was entered on December 8, 2006. A timely petition for rehearing was denied on March 8, 2007. (App. 20a.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE INVOLVED

The Sixth Amendment to the Constitution provides that a criminal defendant shall be tried "by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." U.S. Const. amend VI.

The text of Rule 18 of the Federal Rules of Criminal Procedure provides that "the government must prosecute an offense in a district where the offense was committed," unless "a statute or these rules permit otherwise." Fed. R. Crim. P. 18.

The text of 18 U.S.C. § 3238 provides that the "trial of all offenses begun or committed . . . out of the jurisdiction of any particular State or district, shall be in the district in which the offender . . . is arrested or is first brought; but if such offender or offenders are not so arrested or brought into

any district, an indictment or information may be filed in the district of the last known residence of the offender . . . , or if no such residence is known the indictment or information may be filed in the District of Columbia."

The text of 18 U.S.C. § 3231 provides that the "district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

STATEMENT OF THE CASE

Mr. Gurr was a resident of American Samoa who was accused of committing a crime there. But he was neither arrested, indicted, nor tried in American Samoa. Instead, he was arrested in Hawaii and indicted, tried, and convicted in the District of Columbia, a location over 7,000 miles from his home. That process blatantly violated Mr. Gurr's Sixth Amendment right to a trial by a jury of his peers in the district in which the alleged crime was committed. The trial also violated federal statutes requiring that any trial of Mr. Gurr had to take place in the district in which the alleged offense took place.

Nevertheless, the Court of Appeals held that residents of American Samoa accused of committing federal offenses not only may but *must* be tried by juries in United States district courts, despite the existence of a federal court in American Samoa. The decision denies Mr. Gurr and tens of thousands of other individuals these constitutional and statutory rights. It rests on a fundamental misunderstanding about the rights of residents of American Samoa, and it warrants the Court's review.

The questions posed in this case involve constitutional and statutory issues of exceptional importance: an individual's constitutional rights to trial by a jury of his or her peers and to trial in the place previously determined by Congress. Specifically, the case raises the question whether the Gov-

ernment may try a defendant in a court and before a jury over 7,000 miles from where a crime was committed. The petition also implicates the organization of the lower federal courts and whether Congress intended for a district court in the District of Columbia to shoulder, in addition to the cases in its own district, the criminal prosecutions of an entire United States territory. Therefore, the Court should grant the petition to address these important questions of constitutional rights and organization of the federal courts.

The Government's arguments below rested entirely on the mistaken impression that the "district" in which a defendant must be tried can only be a "United States district court." However, history and precedent conclusively demonstrate that the term district means any location in which a competent federal court exists. No federal statute grants the United States district courts exclusive jurisdiction over federal criminal trials. To the contrary, the jurisdiction of the United States district courts is exclusive only of the states, and other federal courts have exercised criminal jurisdiction many times in the past. Any American Samoan accused of committing a federal crime in American Samoa, therefore, has a constitutional and statutory right to be tried there, and not in a far-flung location selected by law enforcement officials.

A. American Samoa and the Statutory Scheme.

American Samoa is an unincorporated territory of the United States consisting of several islands in the South Pacific Ocean. It is located over 7,000 miles from the District of Columbia. When the United States formally accepted the cession of American Samoa in 1929, Congress exercised its plenary constitutional authority over the territories, *see* U.S. Const. art. IV, § 3, and delegated to the President the authority to exercise all civil, military, and judicial powers over the islands. S.J. Res. 110, 70th Cong., 45 Stat. 1253 (1929), H.R.J. Res. 59, 70th Cong., 46 Stat. 3 (1929), *codified at* 48

U.S.C. § 1661. In 1951, President Truman transferred that authority to the Secretary of the Interior. Exec. Order 10264, 16 Fed. Reg. 6417, 6419 (June 29, 1951), *reprinted in* 48 U.S.C. § 1662.

In 1967, the Secretary of the Interior ratified the Constitution of American Samoa. Am. Samoa Const. art. V, § 11. Amendments to that Constitution can be made only by an act of Congress. *See* 48 U.S.C. § 1662a. The Constitution provides that the judicial power shall be vested in the High Court, the District Courts, and such other courts as may from time to time be created. Am. Samoa Const. art. III, § 3. The Constitution also grants the Secretary of the Interior absolute authority to appoint a Chief Justice of American Samoa and such Associate Justices as he may deem necessary. Am. Samoa Const. art. III, § 3. The Secretary similarly must approve any "[l]aws or regulations bearing on the organization or operation of the judiciary . . . prior to promulgation." Order, Sec'y of the Interior, No. 2657, § 4, 16 Fed. Reg. 9052, 9052 (Sept. 6, 1951). Among other things, the High Court of American Samoa has original jurisdiction over "criminal cases in which a felony is charged." Am. Samoa Code Ann. § 3.0208(a)(2).

In 1975, the U.S. Court of Appeals for the District of Columbia Circuit correctly recognized that American Samoans, as United States nationals, enjoy the fundamental rights guaranteed by the Constitution in the Bill of Rights. *King v. Morton*, 520 F.2d 1140, 1147-48 (D.C. Cir. 1975). Upon remand in the same case, the District Court for the District of Columbia determined that the residents of American Samoa enjoy the right to trial by jury and all the rights encompassed therein. *King v. Andrus*, 452 F. Supp. 11, 17 (D.D.C. 1977). The judicial code of American Samoa now expressly recognizes a right to trial by jury in criminal cases. Am. Samoa Code Ann. § 3.0232(a).

The Sixth Amendment to the Constitution requires that a criminal defendant be tried "by an impartial jury of the State and district wherein the crime shall have been committed" and that the site of the trial be "previously ascertained by law." U.S. Const. amend. VI. Rule 18 of the Federal Rules of Criminal Procedure provides that "the government must prosecute an offense in a district where the offense was committed," unless "a statute or these rules permit otherwise." Fed. R. Crim. P. 18.

The exception provided in Rule 18 exists out of necessity for those crimes occurring where no United States court is available, such as for crimes "begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district." 18 U.S.C. § 3238. In those situations, federal law provides that a defendant shall be tried in the district in which he or she is arrested or first brought. *Id.* If a defendant is not arrested or brought into any district, he or she may be indicted in the district of his or her last known address, or if none is known, in the District of Columbia. *Id.*

Section 3231 of Title 18 confers original jurisdiction to the district courts of the United States over all offenses against the laws of the United States "exclusive of the courts of the States," but it is silent as to the concurrent jurisdiction of federal courts other than the district courts. An unbroken line of cases makes clear, however, that original jurisdiction over offenses against the United States can be and has been vested in other federal courts. *See, e.g.*, *Grafton v. United States*, 206 U.S. 333, 348 (1907) (noting concurrent jurisdiction of military and civil courts over federal offenses); *United States v. Santos*, 623 F.2d 75, 76-77 (9th Cir. 1980) (affirming trial for offense against the laws of the United States in the District Court of Guam under Rule 18 and holding Section 3238 inapplicable, even though the District Court of Guam is not a "district court of the United States").

B. Factual and Procedural History.

ON December 2, 1999, Mr. Gurr was named in a five count indictment filed in the District of Columbia. (App. 2a.) On December 11, 1999, Mr. Gurr flew from American Samoa to Hawaii, where he was arrested shortly after landing. (App. 2a.) Several months later, Mr. Gurr was charged in the District of Columbia with a superseding indictment adding several additional counts, including conspiracy, fraud, and embezzlement. (App. 2a-3a) Mr. Gurr was tried in November 2003 by a jury selected from residents of the District of Columbia. That jury rendered a verdict of guilty on November 14, 2003.

Prior to sentencing, Mr. Gurr requested that the Court dismiss the indictment on grounds of improper venue and violation of his Sixth Amendment rights. He contended that, pursuant to federal statute, he should have been tried in a American Samoan court rather than in the District of Columbia. Mr. Gurr filed a supplemental *pro se* brief arguing that trial in the District of Columbia also violated his constitutional right to a jury of his peers in the location where the crime was committed. The District Court rejected Mr. Gurr's claims.

Mr. Gurr appealed his conviction to the Court of Appeals. The Court of Appeals addressed only Mr. Gurr's statutory objections to venue, holding that the district courts of the United States have exclusive jurisdiction of all offenses against the United States and that because Mr. Gurr committed his crimes outside the jurisdiction of any state or district, his indictment in the District of Columbia was proper. Mr. Gurr filed a petition for rehearing and rehearing *en banc* again raising the questions asserted in the petition, which was denied.

REASONS FOR GRANTING THE PETITION

The petition raises the important question whether an American Samoan national who is accused of committing a crime in American Samoa may be indicted and tried by a federal court located over 7,000 miles away from American Samoa. As explained herein, the Government blatantly violated the Sixth Amendment's guarantee that a criminal trial shall take place in the district where the crime was committed.

These significant questions warrant the Court's review. They are recurring, as recent litigation in the Ninth Circuit confirms. And because this practice is likely only to be challenged in the Ninth Circuit and the District of Columbia Circuit, there is no reason for further percolation of the questions presented. Absent review, the District of Columbia and Ninth Circuits have created a nationwide rule depriving American Samoans of their constitutional and statutory rights. The Court should grant review.

I. THE QUESTIONS PRESENTED ARE IMPORTANT, RECURRING, AND MATURE.

A. The Questions Are Important Ones.

The holding of the Court of Appeals seriously interferes with individual constitutional rights and the proper organization of the federal courts. The holding subjects the entire population of American Samoa, roughly 58,000 individuals, to criminal trial in the District of Columbia for crimes committed 7,000 miles away in American Samoa. That holding is an unjustified and unconstitutional burden on the people of American Samoa. The right to a jury trial by one's peers in the location where the crime was committed is a fundamental constitutional right that should be addressed and confirmed by the Supreme Court.

This individual right to a jury of one's peers is an essential fundamental right. The competency of the jury "lies at the very heart of the jury system." *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946). Moreover, the Founders, "[a]ware of the unfairness and hardship to which trial in an environment alien to the accused exposes him," guaranteed the right to trial by a jury where the offense was committed. *United States v. Johnson*, 323 U.S. 273, 275 (1944). The Government's and the Court of Appeals' disregard for these rights "opens the door to needless hardship" and to "the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution." *Id.* Thus, the Court should address whether the Court of Appeals' decision infringes on these fundamental constitutional rights.

The Court of Appeals' decision removes the decision regarding venue from the constitutional authority of Congress. If Section 3238, allowing trial in whatever district the defendant is first brought, actually did apply here, the Government could try American Samoans in whatever district it chose simply by arresting the defendant in American Samoa and then transporting them to the district *of the Government's choosing*. The Court of Appeals' decision places the choice of venue entirely in the hands of federal law enforcement officers, an arrangement incompatible with the Constitution and fraught with the appearance of and potential for abuse. *See Johnson*, 323 U.S. at 275.

Nonetheless, because Section 3238 allows for trial of allows for indictment in the District of Columbia if a defendant is not first brought into another "district," the Government will likely, in these cases, bring trial in the District of Columbia. The trial of American Samoans in the District of Columbia not only violates the Samoans' constitutional rights, but also burdens the courts and population of the District. Under the holding of the Court of Appeals, prosecutors are free to use the courts of Washington, D.C. to enforce

federal law on individuals located thousands of miles away. In addition to the substantial caseload involving its own population, the federal court in the District of Columbia will be forced to shoulder the burden of enforcing federal law on an additional population of 58,000 individuals.

This case implicates not only important fundamental constitutional rights, but also the "weighty congressional policy concerning the proper organization of the federal courts." *Khanh Phuong Nguyen v. United States*, 539 U.S. 69, 79 (2003). This Court has often exercised its authority to enforce the proper functioning of the federal court system. *See, e.g., id.*; *William Cramp & Sons Ship & Engine Bldg. Co. v. Int'l Curtis Marine Turbine Co.*, 228 U.S. 645 (1913); *Am. Constr. Co. v. Jacksonville, Tampa & Key West Ry. Co.*, 148 U.S. 372 (1893). The Court should intervene in this case to provide an answer in an area where the Courts of Appeals have conceded a need for guidance[1] and to ensure that the disregard for constitutional rights and the misinterpretation of congressional statute does not result in a division of labor among the courts that Congress did not intend.

B. The Questions Involved are Recurring and Mature.

Within the last few months, both the Court of Appeals

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[1] In September 2006, the Ninth Circuit's Advisory Committee on Criminal Rules conceded in a report on a proposed rule governing searches in American Samoa that although U.S. district courts "have jurisdiction over crimes occurring in American Samoa, *the appropriate venue for such prosecutions is far less clear.*" Report on Proposed Rule Amendment Governing Searches of Property, Pacific Islands Committee of the Judicial Council of the Ninth Circuit, September 19, 2006, *available at* http://www.uscourts.gov/rules/CR%20Comments%202006/06-CR-001.pdf (last visited Mar. 22, 2007) (App. 21a-28a) (emphasis added). At the same time as it voted to adopt the report on September 19, 2006, the Ninth Circuit was considering that very question in *United States v. Kil Soo Lee*, 472 F.3d 638 (9th Cir. 2006).

for the District of Columbia and for the Ninth Circuit have answered the questions involved here and effectively created a nationwide rule regarding the trial of American Samoans outside of American Samoa. Only several weeks before the Court of Appeals denied a petition for rehearing *en banc* in this case, the Court of Appeals for the Ninth Circuit took the same action in a similar case. In *United States v. Kil Soo Lee*, 472 F.3d 638 (9th Cir. 2006), the Court of Appeals for the Ninth Circuit addressed the question of whether a defendant, who committed a crime in American Samoa, could be tried in the District of Hawaii. The court applied one of the same statutes at issue here, 18 U.S.C. § 3238, which permits trial for any crime committed outside of any particular district to occur in the place the defendant is first brought or arrested or in the District of Columbia. The defendant in *Lee* was first brought to the District of Hawaii and so was tried in the U.S. District Court for the District of Hawaii. As the court did in *Gurr*, the Court of Appeals for the Ninth Circuit ignored the defendant's constitutional arguments and misinterpreted Section 3238 as an exception to Rule 18's directive that trials be held in the district where the offense was committed. On February 15, 2007, the court denied the defendant's petition for rehearing *en banc*.

With the Courts of Appeals for the District of Columbia Circuit and the Ninth Circuit having both addressed the questions involved in this case, and both convictions not yet final, this case presents an ideal vehicle for the Court to address the important constitutional and statutory issues involved. These two decisions effectively create a nationwide rule for the trial of American Samoans, as the question is unlikely to arise before any other circuit court. Where applicable, Section 3238 provides for trial in the district to which the defendant is first brought, in the district of the defendant's last known address, or in the District of Columbia. In the event an American Samoan is brought into the United States, he or

she mostly likely would fly first to Hawaii or California, both within the jurisdiction of the Ninth Circuit. Otherwise, unless the defendant has previously lived in the United States, he or she will be indicted in the District of Columbia.

Absent review, it is certain that American Samoans will be subject to the same constitutional violations suffered by Mr. Gurr. Press releases on the Justice Department's website confirm that *Lee* and this case are the beginning, rather than the end, of such prosecutions. *See, e.g.,* Press Release, U.S. Department of Justice, Defendants Sentenced in Cases Involving Bribery and Fraud Schemes in American Samoa (Oct. 18, 2005), *available at* http://www.usdoj.gov/opa/pr/2005/October/05_crm_553.html (last visited Mar. 22, 2007) (App. 29a-32a) (announcing conviction of three American Samoans in the U.S. District Court for the District of Hawaii); Press Release, U.S. Department of Justice (Feb. 13, 2005), *available at* http://honolulu.fbi.gov/pressrel/2006/hn021306.htm (last visited Mar. 22, 2007) (App. 33a-34a) (announcing arrest of an American Samoan and his transportation to Hawaii to face charges). Because those prosecutions are unlikely to occur outside the District of Columbia or Hawaii, however, this Court is unlikely to have the benefit of further elaboration of the issue by other courts of appeal.

Accordingly, the decisions of the two circuit courts and the certainty that the issue will recur make the issue mature for review by this Court.

II. THE DECISION BELOW WRONGLY SUBJECTS THOUSANDS OF AMERICAN NATIONALS TO TRIAL BY JURY IN A LOCATION THOUSANDS OF MILES FROM THE DISTRICT IN WHICH THE CRIMES ARE ALLEGEDLY COMMITTED.

Mr. Gurr was denied his right to a jury trial as guaranteed by the Sixth Amendment: "by an impartial jury of the State

and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." U.S. Const. amend. VI. Though Mr. Gurr allegedly committed credit union fraud entirely within American Samoa, he was indicted in the District of Columbia and was brought to Washington, D.C. for trial, despite the existence of a federal court in American Samoa. For two reasons, the Sixth Amendment required the Government to try Mr. Gurr in the district where he committed his crime: American Samoa.

First, the Sixth Amendment guarantees Mr. Gurr the right to trial in the "district" in which he committed his crime. The history and the Supreme Court's application of the Sixth Amendment's vicinage requirement clearly demonstrate that the term does not refer necessarily to trial in a United States district court, but to trial in the geographic area where the crime was committed. The vicinage requirement ensures that defendants have access to witnesses, that prosecutors do not abuse bias in jury selection, and that communities can exercise their right to hold those responsible who err against them. "These are matters that touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests." *United States v. Johnson*, 323 U.S. 273, 276 (1944).

Second, the Sixth Amendment guarantees Mr. Gurr notice of the district in which he will be tried, and Congress has determined that federal crimes committed in American Samoa will be tried in American Samoa. Rule 18 of the Federal Rules of Criminal Procedure provides that "the government *must* prosecute an offense in a district where the offense was committed," unless "a statute or these rules permit otherwise." Fed. R. Crim. P. 18 (emphasis added). In reaching its decision that jurisdiction was proper in the District of Columbia, the Court of Appeals relied on two statutes: 18 U.S.C. § 3238, providing that, for crimes committed "out of

the jurisdiction of any particular State or district," a defendant may be indicted in the District of Columbia if not first brought to another district, and 18 U.S.C. § 3231, granting the district courts of the United States jurisdiction, exclusive of the states, over all offenses against the laws of the United States. These statutes do not provide any exception Rule 18. Section 3238 applies only to crimes committed outside of the jurisdiction of a district or state and Section 3231 preempts the jurisdiction only of the "States," not other federal courts. American Samoa falls into neither of these categories and, as a host of prior cases demonstrates, Rule 18 applies with full force to the competent U.S. courts of the territories.

The Sixth Amendment and federal statute therefore require that Mr. Gurr be tried by a jury in American Samoa, the location where he committed his crime and the location previously ascertained by Congress.

A. Trial of Mr. Gurr in the District of Columbia Violated His Constitutional Rights to Trial by a Jury from the District Where the Crime Was Allegedly Committed.

Mr. Gurr has a constitutional right to be tried by a jury in American Samoa, the location where he allegedly committed his crime. The Sixth Amendment guarantees, in all criminal prosecutions, the right to trial "by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI. The history and the Supreme Court's application of this provision reveal that the term "district" refers not to trial in the district of a United States district court but to what the Founders believed to be the inalienable right to trial by a jury drawn from the community where the crime was committed. The Founders intended this guarantee to ensure that criminal defendants were not dragged from the communities where they allegedly committed crimes and placed before alien juries many miles away, as George III did to colonists prior to the Revolution and as

the federal Government did to Mr. Gurr in this case.[2]

This individual right is necessary to protect several interests. First, the right prevents governments from choosing a community more likely to convict the defendant. *See Johnson*, 323 U.S. at 275. Second, it ensures that a defendant is not forced to defend himself in a distant forum, far from the witnesses willing to testify on his behalf. *Id.* at 275, 278. Third, the right ensures that the defendant will be judged by the community where he committed the crime and under that community's values, morals, and way of life. *See* Engel, *supra*, at 1676, 1687. Mr. Gurr's trial in the District of Columbia was offensive to each of these principles.

The right to trial by a jury in the location the crime took place, known traditionally as "vicinage", is deeply rooted in the common law.[3] William Blackstone wrote that, when trying a crime, the sheriff was required to empanel a jury "of the visne or neighbourhood, which is interpreted to be of the

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[2] Article III contains a similar provision: "The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." U.S. Const. art. III, § 2. If reading this provision alone, one might conclude that Article III grants Congress plenary discretion to designate the location of trials for crimes in American Samoa, American Samoa not being a "State." However, while the venue provision of Article III is a structural provision guaranteeing the right of a community wronged by a defendant to try him themselves, *see* Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. Rev. 1658, 1676, 1687 (2000), the Sixth Amendment, by contrast, is a guarantee of the *individual* right to trial by a jury where the crime took place. *See Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (emphasis added).

[3] An examination of the history of the provision is essential "because the Constitution carries the gloss of history." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (Brennan, J., concurring in judgment)).

county where the fact is committed." William Blackstone, 4 Commentaries 345. He further asserted, in no uncertain terms, "It is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of *his neighbours and equals*." 3 *id.* at 379 (emphasis added) (cited in Engel, *supra*, at 1677).

The Founders adopted the right to vicinage as one of the great bulwarks of an impartial justice system. In 1769, in response to the colonists' reaction to additional taxation, Parliament resolved that George III should revive a statute permitting the Crown to try colonists for treason in English courts, who would be more favorable to the Crown than would a jury of fellow colonists. *See* Drew L. Kershen, *Vicinage*, 29 Okla. L. Rev. 801, 806-07 (1976) (citing 35 Henry VIII, c.2 (1543); 12 Geo. III, c.24 (1772)). The Virginia House of Burgesses called Parliament's resolution a "new, unusual, . . . unconstitutional and illegal Mode" to deny colonists "the inestimable Privilege of being tried by a Jury from the Vicinage." Virginia Resolves (May 16, 1769), *reprinted in* Journals of the House of Burgesses, 1766-1769, at 214-16 (John Pendleton Kennedy ed., 1906), *quoted in* Kershen, *supra*, at 815.

The right to vicinage was addressed at the first meeting of the Continental Congress, which expressed grave concern regarding the Crown's practice of trying colonists and British soldiers in the English courts:

> [T]he . . . great right . . . of trial by jury . . . provides, that neither life, liberty nor property, can be taken from the possessor, until twelve of his unexceptionable countrymen and peers of his vicinage, who from that neighborhood may reasonably be supposed to be acquainted with his character, and the

> characters of the witnesses . . . shall pass their sentence upon oath against him.

Continental Congress's Address to the Inhabitants of Quebec (Oct. 26, 1774), *reprinted in* 1 Journals of Continental Congress, 1774-1789, at 107 (1904), *quoted in* Kershen, *supra*, at 815. This unwavering commitment to the right of vicinage culminated in the Declaration of Independence in an objection to the King's "transporting us beyond Seas to be tried for pretend Offences." The Declaration of Independence para. 21 (U.S. 1776). It is not difficult to see the clear correlation between the trial of colonists before an English jury, an ocean away from the site of the crime, and the trial of Mr. Gurr before a jury in the District of Columbia, an ocean away from American Samoa. Both are equally offensive to the long-established right of vicinage.

The right to vicinage is now firmly enshrined in the Constitution and enforced by the courts. The drafters of the Sixth Amendment constitutionalized the vicinage right, leaving the district's size to the political process, but never questioned that a trial far from the location of the crime would be a violation of the fundamental right to a jury trial. *See United States v. Grisham*, 63 F.3d 1074, 1079 (11th Cir. 1995); Engel, *supra* at 1690 (citing 1 Annals of Cong. 913 (Joseph Gales ed., 1789)).

There is no question that when requiring a trial to be conducted in the "district" in which it took place, the Founders were not limiting trials to "United States district courts." Indeed, the Constitution does not even provide for United States district courts; it provides only for the Supreme Court and "such inferior courts as the Congress may from time to time ordain and establish." U.S. Const. art. III. Clearly, therefore, the Constitution does not consider "district" and "United States district court" as identical terms, and the Sixth Amendment guarantees the right to a trial by a jury of one's peers in the location where the crime took place, not in

the first available United States district court.

This Court has enforced vicinage to ensure juries are representative of that particular community, noting, "[t]he American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community." *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946). The Court has struck down restrictions prohibiting from the jury pool day laborers, *id.*, women, *Taylor*, 419 U.S. at 530, and African Americans, *Carter v. Jury Comm'n*, 396 U.S. 320, 330 (1970).[4] Thus, the Court has been adamant that a jury be representative of the values held and experiences had by the community in which the defendant committed his crime.

The Court has also enforced the vicinage requirement to ensure defendants are not tried by a *different* community. In *United States v. Johnson*, 323 U.S. at 274, the Court enforced the Constitution's vicinage requirement, interpreting the Federal Denture Act to permit a criminal trial only in the district from which illegal dentures were sent, not in those to which they were sent. Unlike in this case, violators of the Federal Denture Act could be said to have "committed" the crime in both locations, but the Court determined that its interpretation was "more consonant with the considerations of historic experience and policy which underlie those safeguards in the Constitution regarding the trial of crimes." *Id.* at 275. Trial far from the place the crime was committed "not only opens the door to needless hardship to an accused by prosecution remote from home and from appropriate fa-

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[4] The Court has used the Sixth Amendment to guarantee the vicinage requirement of a representative jury pool and venire while using the Equal Protection Clause of the Fourteenth Amendment to prevent unwarranted discrimination in the use of preemptory challenges. *See* K. Winchester Gaines, *Race, Venue and the Rodney King Case: Can Batson Save the Vicinage Community?*, 73 U. DETROIT MERCY L. REV. 271, 282 (1996).

cilities for defense. It also leads to the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution." *Id.* These policy considerations apply with even greater force here, where Mr. Gurr's crimes were committed unquestionably in American Samoa.

Mr. Gurr's trial in the District of Columbia constituted a significant violation of these principles. Mr. Gurr was taken half-way around the world for trial before a community without any knowledge of the customs, values, or way of life in American Samoa, and far from those witnesses available to testify on his behalf. In addition, the jury was drawn from a pool with a vastly different racial make-up than in American Samoa. His jury was not representative of the community in which he allegedly committed his crime and was a violation of his constitutional right to trial by a jury of his peers.

B. Trial of Mr. Gurr in the District of Columbia Violated His Constitutional Right to a Trial in American Samoa, the District "Previously Ascertained by Law."

At a minimum, Mr. Gurr has a right to trial in American Samoa because that is the place of trial directed by law for crimes committed in American Samoa. Not only does a criminal defendant have a right to trial in the "State and district" where the crime was committed, but also a right to trial in a district "that shall have been previously ascertained by law." U.S. Const. amend VI. Mr. Gurr's rights under this second provision of the Sixth Amendment were violated when he was tried in the District of Columbia despite plain statutory direction that he be tried in American Samoa.

Rule 18 of the Federal Rules of Criminal Procedure provides that "the government *must* prosecute an offense in a district where the offense was committed," unless "a statute or these rules permit otherwise." Fed. R. Crim. P. 18 (em-

phasis added). For crimes not committed in any district, 18 U.S.C. § 3238 provides for alternative venue rules, upon which the district court and the Court of Appeals relied in holding that venue was proper in the District of Columbia. The critical question is whether Rule 18 or Section 3238 governs this case, a question that turns entirely on the meaning of "district" as used in those provisions. As discussed above, a reading of "district" to include American Samoa is constitutionally mandated by the Sixth Amendment. For the following additional reasons, Mr. Gurr respectfully submits that the district court and the Court of Appeals misunderstood the meaning of that word.

The Court of Appeals' and the Government's error lay in the conflation of "district" and "district court." The Government assumed in all its prior briefs that Section 3238, which applies when a crime occurs outside of any "district," applies when a crime occurs outside of the jurisdiction of a "United States district court." But overwhelming evidence precludes such a reading of Section 3238.

First, courts have consistently rejected the idea that the appellation of "district" necessarily or exclusively carries with it all the powers and status accorded to the "district courts of the United States." Indeed, the district court for the Western District of Washington expressly held that the word "district" in a precursor to Section 3238 did require transfer of a case to a United States district court. Thus, it found venue proper in the United States Court for China, notwithstanding the lack of the word "district" in its title. *United States v. Chapman*, 14 F.2d 312, 313 (D. Wash. 1926) ("'District' is to be understood as meaning the territorial jurisdiction of a United States court, whatever may be the title of the court . . . .").

The "United States Court for the Indian Territory" similarly had "exclusive original jurisdiction over all offenses against the laws of the United States committed within the

Indian Territory . . . not punishable by death or by imprisonment at hard labor." Act of Mar. 1, 1889, ch. 333, § 5, 25 Stat. 783. The Supreme Court had occasion to review the power of that court to try crimes, but never was the application of Section 3238 even considered on the basis that the word "district" did not appear in its title. *E.g.*, *Lucas v. United States*, 163 U.S. 612 (1896). And in subsequent cases involving other courts, the Court has paid attention to substance over form in deciding the jurisdiction of a particular court. *E.g.*, *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 594-95 (1976) (focusing on the Federal District Court of Puerto Rico's *power* – rather than its status *vel non* as a "district court of the United States" – to define its jurisdiction).

Second, if American Samoa truly lies "out of the jurisdiction of any particular . . . district," 18 U.S.C. § 3238, it is a lonely anomaly among the inhabited United States possessions. The residents of Puerto Rico, Guam, Northern Mariana Islands, and the Virgin Islands all enjoy a right to trial in courts located in those jurisdictions, whether under federal or local law. And Congress has expressly defined the jurisdiction of the district court of Hawaii to include "the Midway Islands, Wake Island, Johnston Island, Sand Island, Kingman Reef, Palmyra Island, Baker Island, Howland Island, Jarvis Island, Canton Island, and Enderbury Island." 28 U.S.C. § 91. The logical inference from this arrangement is not that Congress forgot about American Samoa, but that it respected the existing jurisdiction of the federal court organized there by the Interior Department, which currently exercises the plenary authority over the islands long ago delegated by Congress to the executive department. *See* S.J. Res. 110, 70th Cong., 45 Stat. 1253, § c (1929) (vesting all governmental powers over American Samoa "in such person or persons . . . as the President of the United States may direct"); Exec. Order 10264, 16 Fed. Reg. 6417, 6417, 6419

(1951) (vesting authority delegated under 45 Stat. 1253 in the Secretary of the Interior).[5]

Third, Section 3231, upon which the Court of Appeals relied for its implicit holding that the High Court of American Samoa lacked jurisdiction to hear Mr. Gurr's case, states only that the original jurisdiction of the district courts of the United States to try offenses against the laws of the United States are "exclusive of the *courts of the States*," whose membership does not include the High Court of American Samoa. 18 U.S.C. § 3231 (emphasis added). The Government relied on this same argument in its previous briefs, claiming that this statute grants U.S. district courts exclusive jurisdiction over all other courts. But it is indisputable that the district courts of the United States – a term of art referring specifically to the Article III courts that occupy "judicial districts" – do not have *exclusive* original jurisdiction of *all* offenses against the laws of the United States over other federal courts. Military and territorial courts try such offenses, despite not being district courts of the United States. *See, e.g.*, *Grafton v. United States*, 206 U.S. 333, 348 (1907) (not-

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[5] The Court of Appeals' construction of 3238 would also mean that, until 1963, the United States was essentially powerless to prosecute offenses against federal law in American Samoa, notwithstanding the fact that the laws of the United States plainly extend to that territory under 18 U.S.C. § 5. Mainland prosecutors were powerless to prevent the tolling of statutes of limitations by filing in the District of Columbia until Section 3238 was amended in 1963, 63 years after American Samoa was first ceded to the United States. *See generally* S. Rep. No. 88-146 (1963), *reprinted in* 1963 U.S.C.C.A.N. 660. That is a rather long time to wait to provide for the enforcement of federal law in a territory, and there is no basis in the legislative history of the 1963 amendment to believe that that is what Congress thought it was doing. In other cases, Congress has acted quickly to provide authority to try offenses against the laws of the United States in the territories. *See, e.g.*, *Cook v. United States*, 138 U.S. 157, 173 (1891) (discussing legislative history extending federal court jurisdiction to the "Public Land Strip," which for a time lay beyond the powers of any court).

ing concurrent jurisdiction of military and civil courts over federal offenses); *United States v. Santos*, 623 F.2d 75, 76-77 (9th Cir. 1980) (affirming trial for offense against the laws of the United States in the District Court of Guam under Rule 18 and holding Section 3238 inapplicable, even though the District Court of Guam is not a "district court of the United States"). Section 3231 is thus inapplicable and does not divest the High Court of American Samoa of original jurisdiction over Mr. Gurr's case.

The language of Section 3238 and the above authority make it plain that the relevant consideration is not whether the district constitutes a United States district court, but whether a court with authority over a particular geographical domain has *jurisdiction* to hear the case. *See* 18 U.S.C. § 3238 (providing for venue in cases of offenses "begun or committed upon the high seas, or elsewhere *out of the jurisdiction* of any State or district" (emphasis added)). American Samoa satisfies this requirement. Chapter 2 of the American Samoa Judicial Code, ratified by the Secretary of the Interior pursuant to the Department's plenary power over the territory, *see* Dep't of Interior Order No. 2657 § 4, 16 Fed. Reg. 9052, 9052 (Sept. 6, 1951), establishes that the "jurisdiction of the High Court shall extend to the whole of American Samoa." Am. Samoa Code Ann. § 3.0201. Chapter 3 further establishes that the trial division of the High Court of American Samoa "shall have original jurisdiction" over "criminal cases in which a felony is charged," without distinguishing crimes committed under the laws of American Samoa from those committed under the laws of the United States. *Id.* § 3.0208(a)(2). And as the Interior Department itself discloses, "United States civil and criminal cases, augmented by such local laws and regulations as enacted by Samoa legislature, constitute the body of law adjudicated in the courts." Department of Interior - Office of Insular Affairs, *American Samoa*, http://www.doi.gov/oia/Islandpages/

asgmain.htm#Government (last visited Mar. 22, 2007).[6] Congress has acknowledged this jurisdiction and thus has provided expressly for cooperation between the Government of American Samoa and the Attorney General of the United States in special cases. *See, e.g.*, 48 U.S.C. § 1494b(a) (providing for enforcement of federal narcotics laws in American Samoa). Thus, any crimes committed in American Samoa are within the jurisdiction of the High Court of American Samoa and American Samoa therefore constitutes a "district" for purposes of Rule 18. Section 3238 – the authority on which the district court and the Court of Appeals relied – is inapplicable.[7]

For the foregoing reasons, Section 3238 is inapplicable and trial should have been had in American Samoa pursuant to Mr. Gurr's constitutional guarantees.

CONCLUSION

For the foregoing reasons, the petition should be granted. In view of the conflict of the decision below with past decisions of this Court, the Court may wish to consider summary reversal.

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[6] This kind of blended jurisdiction – though perhaps anathema to the system familiar to continental Americans – is in fact the rule, rather than the exception, in the island territories. *E.g.*, 48 U.S.C. § 1424 (jurisdiction of the District Court of Guam); 48 U.S.C. § 1822 (jurisdiction of the District Court of Northern Mariana Islands); 48 U.S.C. § 1612 (jurisdiction of the District Court of the Virgin Islands); *see also Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828) (explaining that, in "legislating for [territories], congress exercises the combined powers of the general, and of a state government"). The District Court of Puerto Rico, an Article III court, is the notable exception. *See* 28 U.S.C. § 119.

[7] The District Court of Hawaii reached a similar conclusion with respect to the High Court's authority to try admiralty cases. *Meaamaile v. American Samoa*, 550 F. Supp. 1227, 1236-38 (D. Haw. 1982).

Respectfully submitted,

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March 23, 2007

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 25, 2006 Decided December 8, 2006

No. 05-3122

UNITED STATES OF AMERICA,
APPELLEE

v.

BERNARD GURR,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 99cr00394-01)

Joseph R. Conte, appointed by the court, argued the cause and filed the briefs for appellant.

John P. Gidez, Assistant U.S. Attorney, argued the cause for appellee. With him on the brief were Kenneth L. Wainstein, U.S. Attorney at the time the brief was filed, and Roy W. McLeese III and Elizabeth Trosman, Assistant U.S. Attorneys.

Before: SENTELLE, ROGERS and GARLAND, Circuit Judges

Opinion for the Court filed by Circuit Judge ROGERS.

ROGERS, Circuit Judge: Appellant Bernard Gurr appeals his conviction by a jury of defrauding the United

States when he was the manager of a federal credit union in American Samoa. He contends that the district court erred in (1) denying his motion to suppress documents discovered during a border search upon his arrival at the Honolulu International Airport; (2) admitting, over his hearsay objection, a report by an examiner from the National Credit Union Administration ("NCUA"); and (3) denying his motion for judgment of acquittal of embezzlement (Count 18) and witness tampering (Count 20). Gurr *pro se* also contends that the district court lacked subject matter jurisdiction and that venue was improper. We affirm.

I.

From June 1986 until October 1993, Bernard Gurr was the manager of the American Samoa Government Employees Federal Credit Union, located in American Samoa and supervised and insured by the NCUA. In late 1992, Pete Steiger, a Problem Case Officer at the NCUA, was assigned to review problems that had been identified at the credit union, including inadequate liquidity, poor loan underwriting, and a high loan-deficiency rating. Steiger's investigation and audit of the credit union, which was summarized in a report consisting of an Order of Conservatorship and Confidential Statement of Grounds for Conservatorship, led the NCUA to place the credit union in conservatorship in October 1993. In December 1999, Gurr was indicted with three other credit union employees for conspiring to defraud the United States. The indictment alleged that the goals of the conspiracy were to keep the NCUA from discovering the true financial status of the credit union and to maintain control of the credit union's assets for the personal benefit of the conspirators.

Flying from American Samoa on December 11, 1999, Gurr was arrested for credit union fraud upon landing in Hawaii at the Honolulu International Airport. Shortly after

his arrival, two United States Customs officials seized and searched his luggage and discovered financial documents taken from the credit union. On May 30, 2000, Gurr was charged in a superseding indictment with conspiracy, in violation of 18 U.S.C. § 371 (Count 1); two counts of knowingly making and causing to be made false federal credit institution entries, and aiding and abetting, in violation of 18 U.S.C. §§ 1006, 2 (Counts 2 and 3); fourteen counts of willfully and knowingly defrauding lending, credit, and insurance institutions, and aiding and abetting, in violation of 18 U.S.C. §§ 657, 2 (Counts 4, 6-18); knowingly making and causing to be made false statements in a loan and credit application, and aiding and abetting, in violation of 18 U.S.C. §§ 1014, 2 (Count 5); obstruction of an examination of a financial institution, and aiding and abetting, in violation of 18 U.S.C. §§ 1517, 2 (Count 19); and tampering with a witness, and aiding and abetting, in violation of 18 U.S.C. §§ 1512, 2 (Count 20).

The district court denied Gurr's motion to suppress the financial documents seized during Customs officials' search of his luggage and his motion to reconsider. The district court also overruled Gurr's objections to the admission of the NCUA report prepared by Problem Case Officer Steiger as hearsay, ruling that the report was admissible as a business record under FED. R. EVID. 803(6). The district court granted the government's mid-trial motion to dismiss one count of fraud (Count 7). A jury found Gurr guilty of the remaining counts. On November 14, 2003, the district court sentenced Gurr to 70 months' imprisonment to be followed by three years' supervised release.

II.

Challenging the denial of his motion to suppress the financial documents that U.S. Customs officials seized

during a search of his luggage upon his arrival in the United States, Gurr contends that even if Customs officials generally have the legal authority to perform routine border searches of passengers' luggage, in this case, the warrantless search was unreasonable. The U.S. Customs Service is authorized, pursuant to 19 U.S.C. § 1582,[1] to subject every international traveler to a routine warrantless inspection. *See United States v. Galloway*, 316 F.3d 624, 629 (6th Cir. 2003); *Bradley v. United States*, 299 F.3d 197, 202 (3rd Cir. 2002); *United States v. Yang*, 286 F.3d 940, 944 (7th Cir. 2002); *United States v. Fortna*, 796 F.2d 724, 738 (5th Cir. 1986); 19 C.F.R. § 162.6 (2006). Gurr does not deny this, but instead maintains that the FBI's involvement transformed the inspection from a permissible border action into "an FBI fishing expedition." Appellant's Br. at 11. As proof of the FBI's dominating influence, Gurr points to evidence that the FBI agents were on site and that Customs officials asked the FBI agents whether they should keep the financial documents and, upon seizing them, immediately handed the

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[1] Section 1582 authorizes the Secretary of the Treasury to issue regulations "for the search of persons and baggage . . . coming into the United States from foreign countries." 19 U.S.C. § 1582. Pursuant to that authority, the Secretary's regulations provide, in relevant part:

> All persons, baggage, and merchandise arriving in the Customs territory of the United States from places outside thereof are liable to inspection and search by a Customs officer . . . authorized to cause inspection, examination, and search to be made under section 467, Tariff Act of 1930, as amended (19 U.S.C. § 1467), of persons, baggage, or merchandise, even though such persons, baggage, or merchandise were inspected, examined, [or] searched . . . at another . . . place in the United States or the Virgin Islands, if such action is deemed necessary or appropriate.

19 C.F.R. § 162.6. "Customs territory of the United States . . . includes the States, the District of Columbia, and the Commonwealth of Puerto Rico." *Id.* § 134.1(f); *see also id.* § 7.2.

documents over to the FBI. As Gurr sees it, Customs had no suspicion that his luggage contained contraband or dutiable merchandise,[2] and hence the search was capricious and illegal. Our review of the denial of a motion to suppress is *de novo*. *See United States v. Ornelas*, 517 U.S. 690, 691 (1996).

Congress enjoys a plenary "power to protect the Nation by stopping and examining persons entering this country [and, accordingly], the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior." *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985). "[N]ot only is the expectation of privacy less at the border than in the interior . . ., the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck much more favorably to the Government at the border." *Id.* at 539-40. "[S]earches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." *United States v. Ramsey*, 431 U.S. 606, 616 (1977). The search of a passenger's luggage upon arriving in the United States after a nonstop flight from outside the country is considered "the functional equivalent of a border search." *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973).

Courts have routinely rejected the notion that cooperation among federal agencies renders a border search unlawful. For example, then-Judge Anthony Kennedy, writing in

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[2] Under 19 U.S.C. § 482, a Customs officer is authorized

> to search any trunk or envelope, wherever found, in which [the officer] . . . may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer . . . shall find any merchandise . . . he shall seize and secure the same for trial.

United States v. Schoor, 597 F.2d 1303, 1306 (9th Cir. 1979), confronted similar circumstances as here and rejected the argument that a search violated the Fourth Amendment because it was not limited to a search for contraband and was conducted at the behest of Drug Enforcement Administration ("DEA") agents who lacked probable cause to search. In *Schoor*, DEA agents alerted Customs officials that two passengers suspected of smuggling heroin in transistor radio shipments were en route to the United States on a flight from Thailand and requested that Customs search them, as they might be carrying narcotics. A subsequent search by Customs, in the presence of a DEA agent, revealed bills for radios and other items transported earlier from Thailand, as well as airway bills apparently relating to a shipment of heroin-filled radios seized in Thailand. The two men were arrested by DEA agents for conspiracy to smuggle heroin into the United States, and the DEA agents seized the documents incident to the arrest. Judge Kennedy explained the court's reasoning:

> [T]here is no dispute that the search was conducted at an international border by customs officers legally entitled to search persons entering the United States. That the search was made at the request of the DEA officers does not detract from its legitimacy. Suspicion of customs officials is alone sufficient justification for a border search. The source of that suspicion is irrelevant in sustaining the search.
>
> Moreover, the border search was legitimate in scope. We recognize that the primary purpose of a border search is to seize contraband property unlawfully imported or brought into the United States. However, where customs officers are authorized to search for material subject to duty or otherwise introduced illegally into the United States and they

> discover the instrumentalities or evidence of crimes, they may seize the same.

Id. (citations omitted). The decisions in the other circuits are to the same effect. *See United States v. Boumelhem*, 339 F.3d 414, 423 (6th Cir. 2003); *People v. Villacrusis*, 992 F.2d 886, 887 (9th Cir. 1993); *United States v. Carter*, 592 F.2d 402, 406 (7th Cir. 1979); *United States v. Bates*, 526 F.2d 966, 967 (5th Cir. 1976).

Gurr thus misstates the law in arguing that no case suggests that Customs officials may seize something that they do not know to be contraband. The distinction that Gurr would draw between contraband and documentary evidence of a crime is without legal basis. *Cf. Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 301 (1967). Following Gurr's reasoning, and contrary to *Schoor*, 597 F.2d at 1306, Customs officials could not lawfully seize records of a drug operation during a border search even if Customs had been informed by the DEA that an arrested co-conspirator had implicated the passenger. The Supreme Court has suggested in analogous circumstances that the important factor for a court to consider is whether the search was conducted under proper authority, not the "underlying intent or motivation of the officers involved." *Scott v. United States*, 436 U.S. 128, 138 (1978); *see United States v. Robinson*, 414 U.S. 218, 236 (1973); *see also Boumelhem*, 339 F.3d at 423; *Bates*, 526 F.2d at 967; *cf. United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983); 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.8(b), at 261-62 (4th ed. 2004).

Additionally, Gurr misstates the trial record in asserting that Customs officials "had no idea of the significance of the documents they were looking at" because the documents consisted only of "plain old account numbers with monetary

amounts next to them." Appellant's Br. at 13. Customs officials testified that they knew that the charges pending against Gurr involved a fraud allegedly committed against a federal credit union in American Samoa. The two Customs officials conducting the luggage search had been personally involved in placing Gurr under arrest. U.S. Customs Special Agent Douglas S. Palmer testified that, as a result, their suspicions were heightened, giving them every reason to search Gurr's luggage and notice the financial documents, and that it was a Customs agent who first realized the significance of the financial documents. That agent, Ferdinand Jose, a senior Customs inspector, testified that the FBI agents did not see any of the documents as he took them out of the suitcase and that it was only after he determined their relevance, reported his findings, and turned over the documents to Palmer that it was determined to retain them. Moreover, the documents seized from Gurr's luggage were clearly identifiable as relevant. For example, one of the documents is labeled at the top, "ASG EMPLOYEES FEDERAL CREDIT UNION WITHDRAWAL VOUCHER," and shows a transaction for $5000 cash; another is labeled "JOURNAL VOUCHER: American Samoa Government Employees Federal Credit Union" and shows a transaction for $1000 cash.

For these reasons, it is apparent that the Customs officials conducted a permissible border search and lawfully seized the documents. The district court's finding that there was "some evidence" of FBI involvement in the search, as a result of an FBI request to Customs to retain the financial documents, does not require a different conclusion and we need not address the government's argument based on inevitable discovery, *see Nix v. Williams*, 467 U.S. 431 (1984), and its progeny, upon which the district court relied. *See United States v. Davis*, 181 F.3d 147, 149 (D.C. Cir. 1999).

Moreover, even if we had doubt about the lawfulness of Customs' seizure of Gurr's luggage and assumed, as Gurr maintains, that the superseding indictment sprang from the seizure of the documents found therein, Gurr fails to explain how the financial documents seized at the Honolulu airport affected his convictions on any of the counts in the indictment. On appeal, the government explains that most of the documentary evidence critical to its case was obtained during the course of the NCUA investigation, either from the credit union or the NCUA Texas storage facility, independent of the Honolulu documents. Further, witnesses testified regarding the same information as appeared in the Honolulu documents. For example, as to the Honolulu documents relevant to Counts 6 through 12 involving Gurr's defrauding of Faataumalama Felti, Felti testified that Gurr had told him to sign a receipt for money from his credit union account that he never received. This testimony was bolstered by the introduction of credit union records regarding the suspect transactions. Additional counts that Gurr identifies in his reply brief as having been proved by the Honolulu documents are similarly supported by other record evidence. Hence, any error in admitting the seized financial documents was harmless beyond a reasonable doubt and a new trial is not required. *See Chapman v. California*, 386 U.S. 18, 24 (1967).

III.

Gurr also contends that the district court erred in overruling his hearsay objection to the admission of Exhibit PS 41, the NCUA Order of Conservatorship and Confidential Statement of Grounds for Conservatorship ("the report"). Because the report, which was hearsay, was based, in part, on the NCUA Problem Case Officer's interviews of credit union employees, Gurr maintains that it contained compound hearsay statements by his accusers. From this he concludes

that the report was testimonial and its admission violated his rights under the Confrontation Clause, citing *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 126 S. Ct. 2266 (2006). Specifically, Gurr maintains that the report was "testimonial" because in *Davis*, the Supreme Court concluded that a domestic battery victim's written statements in an affidavit given to the police at a crime scene were "testimonial" and therefore subject to the Confrontation Clause.

In addressing Gurr's hearsay objection, the district court noted that the report appeared to meet the requirements of a business record under FED. R. EVID. 803(6) and that because the preparer of the report was testifying and would be subject to cross-examination, the only remaining question was whether the report contained references to statements by witnesses who would not be testifying at trial. In this regard, the district court observed that page 5 of the Confidential Statement of Grounds for Conservatorship included statements that "information was received from an employee" regarding one of the credit union family accounts and that two former employees had "made allegations . . . about improprieties on the part of current management" that had not been confirmed. The district court initially ruled that the report was inadmissible because of the prejudicial statements by witnesses who were unavailable for the defense to cross-examine. The prosecutor subsequently advised the district court that the sources of the double hearsay would be testifying at trial. The district court then ruled that the report was admissible, noting that the statement concerning the allegations by two former employees was in the nature of minutes, and that upon applying FED. R. EVID. 403, the probative value of the report outweighed any prejudice to Gurr. The district court further indicated that it would redact the compound hearsay statements that appear on page 5 of the report. Our review of

the district court's admission of the report is for abuse of discretion. *See United States v. Kim*, 595 F.2d 755, 763 n.38 (D.C. Cir. 1979).

To the extent that the report was a statement "other than one made by the declarant while testifying at the trial . . . offered in evidence to prove the truth of the matter asserted," FED. R. EVID. 801(c), it was hearsay, and to be admissible it must fall within one of the exceptions to the hearsay rule, *see* FED. R. EVID. 802. The business records exception to the hearsay rule provides for the admission of:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the information or method or circumstances of preparation indicate lack of trustworthiness.

FED. R. EVID. 803(6). The hearsay in records of regularly conducted activity is admissible "only if it was reported to the maker [of the report] directly or through others, by one who is himself acting in the regular course of business, and who has personal knowledge." *United States v. Smith*, 521 F.2d 957, 964 (D.C. Cir. 1975).

"Double hearsay exists when a business record is prepared by one employee from information supplied by another employee." *United States v. Baker*, 693 F.2d 183, 188 (D.C. Cir. 1982); *see* FED. R. EVID. 805. It is excepted from the hearsay rule provided "both the source and the recorder of the information, as well as every other participant

in the chain producing the record, are acting in the regular course of business," *Baker*, 693 F.2d at 188. Because the regularity of making the record is evidence of its accuracy, statements by "outsiders" are not admissible for their truth under FED. R. EVID. 803(6), *see Baker*, 693 F.2d at 188 (citing *United States v. Davis*, 571 F.2d 1354 (5th Cir. 1978); 4 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE, § 448 (1980); MCCORMICK ON EVIDENCE § 310, at 725-26 (2d ed. 1972); 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 803(6)[04] (1981)), in the absence of a showing that the outsider had a duty to report the information, *see United States v. Bortnovsky*, 879 F.2d 30, 34 (2d Cir. 1989), or that it was standard practice for the preparer to verify information from outside sources, *see United States v. Patrick*, 959 F.2d 991, 1001 (D.C. Cir. 1992).

On appeal, Gurr does not challenge the district court's factual findings that, as Steiger, the preparer of the report, testified, it was the regular practice of the NCUA to create these reports in order to place credit unions into conservatorship, and that it was a normal part of his job to prepare the Confidential Statement of Grounds for Conservatorship, which he did in this case.[3] Gurr offers

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[3] Gurr's claim that the report was made in contemplation of litigation and therefore was inadmissible under FED. R. EVID. 803(6), *see Palmer v. Hoffman*, 318 U.S. 109, 113-14 (1943); *Scheerer v. Hardee's Food Systems, Inc.*, 92 F.3d 702, 706-07 (8th Cir. 1996), is raised for the first time on appeal and he cannot show plain error, *see United States v. Thomas*, 896 F.2d 589, 591 (D.C. Cir. 1990). The credit union was in fact placed in conservatorship and the preparer of the substantive part of the report, i.e., the Confidential Statement of Grounds for Conservatorship, testified at trial. Gurr's further claim that factual findings in public reports under FED. R. EVID. 803(8)(C) are admissible only against the government in criminal cases appears only in his reply brief and is therefore waived, *see United States v. Taylor*, 339 F.3d 973, 977 (D.C. Cir. 2003); in any event, any error was harmless because the

nothing to suggest a lack of trustworthiness as to Steiger's recording of his opinions, diagnoses, and observations. *See United States v. Frazier*, 53 F.3d 1105, 1109-10 (10th Cir. 1995) (citing 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 450, at 534-36 (2d ed. 1994)); *cf. United States v. Garland*, 991 F.2d 328, 334-35 (6th Cir. 1993). Instead, Gurr contends that the district court erred in admitting the report for three reasons.

First, Gurr maintains that the report was hearsay admitted in violation of FED. R. EVID. 802. However, most of the report appears to be admissible as Steiger's course-of-business observations under the exception of FED. R. EVID. 803(6). Gurr has not pointed to anything in the record suggesting otherwise.

Second, Gurr maintains that specific statements within the report were inadmissible double hearsay. Of the five potentially problematic paragraphs on page 5 of the report, Gurr points to only two of them in his brief. Those paragraphs state that "a former employee provided information demonstrating that the manager's list of his immediate family members' accounts was incomplete" and that "information was received from an employee indicating another family account." However, Gurr's counsel published them to the jury, explaining on appeal that he did so in order to impeach the integrity of the report. Two other paragraphs on page 5 include similar statements. One paragraph states that "[f]our former employees and two former directors have allegedly committed fraud." Again, Gurr's counsel published this paragraph during his cross-examination of Steiger. Gurr may not now object to evidence that he himself submitted at trial. The other paragraph states that "two former

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preparer of the report and the persons upon whom he relied testified and were subject to cross-examination at trial. *See United States v. Davis*, 181 F.3d 147, 149-50 (D.C. Cir. 1999).

employees . . . made allegations . . . about improprieties on the part of the current management" that could not be verified. The district court ruled that this paragraph was admissible only as minutes of Steiger's investigation, and not to prove the truth of the allegations against Gurr; hence, it poses no hearsay problem. *See* FED. R. EVID. 801. The double hearsay in the remaining paragraph was an employee's statement that she had been told by a credit union board member "to stand behind current management or look for a new job." Admission of this statement, as well as the other double hearsay, was harmless error because the witnesses testified at the trial and were subject to cross-examination. *See* FED. R. CRIM. P. 52(a); *Kotteakos v. United States*, 328 U.S. 750 (1946).

Third, Gurr maintains that the admission of the double hearsay violated his rights under the Confrontation Clause, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. Because Gurr published some of the double hearsay to the jury and because Steiger, employees (including former employees), and account holders testified at trial and were subject to cross-examination, Gurr's Confrontation Clause contention fails. *See United States v. Powell*, 334 F.3d 42, 45-46 (D.C. Cir. 2003). Even if we were to assume that there had been such a violation, any error in admitting the report was harmless. *See Chapman*, 386 U.S. at 22-23; *Baker*, 693 F.2d at 189; FED. R. CRIM. P. 52(a). The NCUA examiners were available for cross-examination and they testified regarding the reasons for their conclusions that conservatorship was necessary. There was abundant evidence, including documentary evidence, independent of the report relating to the matters it discussed. Defrauded credit union account holders as well as present and former credit union employees testified and were available for cross-examination. A

comparison of the report and the trial record reveals that the government's witnesses testified regarding its key areas of discussion: insolvency, unprofitability, increasing delinquency, non-amortizing loans, liquidity/asset liability management, weak management, and fraud/internal controls.

IV.

Gurr also challenges the sufficiency of the evidence of embezzlement in Count 18[4] and corrupt persuasion of a witness in Count 20.[5]

Viewing the evidence most favorably to the government, as we must, *see United States v. Wahl*, 290 F.3d 370, 375 (D.C. Cir. 2002), there was sufficient evidence that Gurr embezzled money from credit union member Francis Stowers. Embezzlement is "the fraudulent appropriation of property by a person to whom such property has been

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[4] Section 657 provides that it is a criminal offense for any person who

> being an officer, agent or employee of or connected in any capacity with [an insured credit institution,] . . . embezzles, abstracts, purloins or willfully misapplies . . . [funds of that institution] . . . or [funds] pledged or otherwise entrusted to its care.

18 U.S.C. § 657.

[5] Section 1512(b) provides that it is a criminal offense to

> corruptly persuade[] another person, or attempt[] to do so, or engage[] in misleading conduct toward another person, with intent to . . . influence, delay, or prevent the testimony of any person in an official proceeding . . . [or] hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a federal offense.

18 USC § 1512(b).

entrusted, or into whose hands it has lawfully come." *United States v. Holmes*, 611 F.2d 329, 331 (10th Cir. 1979) (quoting *Moore v. United States*, 160 U.S. 268, 269 (1895)). The evidence showed that Stowers, at Gurr's direction, signed a blank voucher; that Gurr told Stowers to return to the credit union the following day to collect his money; that Gurr gave the voucher to the credit union teller and told her to withdraw $5,000 from Stowers' account, which she did, giving the money to Gurr; and that Stowers returned the next day but never received his money. The jury could have reasonably concluded that Gurr embezzled or misapplied credit union funds when he (1) instructed a teller to withdraw the cash meant as a home improvement loan for Stowers; (2) took the money from the teller; and (3) never gave the money to Stowers. As the government maintains, a fair inference can be drawn that Gurr fraudulently converted property entrusted to him and used it for his own purposes.

Similarly, there was sufficient evidence of witness tampering. The evidence showed that after Gurr was arrested, he and another credit union employee (Fiapapalagi Eteuati) attempted to corruptly persuade a witness (Grace Uigalelei) to sign an affidavit falsely stating that she had authorized money to be transferred from her account. Gurr contends that this is insufficient to establish the allegation in the indictment because there was no evidence of cooperation between Gurr and the other credit union employee and no evidence that the witness was intimidated or threatened. However, Gurr was not charged with intimidating or threatening Uigalelei, and the jury could reasonably find that Gurr, with the assistance of Eteuati, attempted to "corruptly persuade[]" Uigalelei in order to influence her testimony by having her sign a false affidavit. *See, e.g., United States v. Sanders*, 421 F.3d 1044, 1051 (9th Cir. 2005); *United States v. LaShay*, 417 F.3d 715, 718 (7th Cir. 2005); *United States v. Cruzado-Laureano*, 404 F.3d 470, 487 (1st Cir. 2005);

United States v. LaFontaine, 210 F.3d 125, 132-33 (2d Cir. 2000).

V.

Finally, Gurr contends that the district court lacked jurisdiction and that venue was improper. He first raised these defenses nearly two years after his conviction (but before sentencing).

Gurr's objection is that only the courts of American Samoa had jurisdiction because that is where the crimes occurred. *See* U.S. CONST. art. III, § 2, cl. 3; 28 U.S.C. §§ 81-144; FED. R. CRIM. P. 18. Contrary to Gurr's contentions, U.S. Code Title 18 applies in American Samoa regardless of whether the Secretary of the Department of the Interior has said so explicitly, *see* 18 U.S.C. § 5, and American Samoan courts do not have jurisdiction of violations of Title 18, *see id.* § 3231. Rather, the district courts of the United States have exclusive, original jurisdiction of all offenses against the laws of the United States. *See id.*

Gurr's objection to venue is also meritless. Although Gurr last resided in American Samoa and was arrested in Hawaii after voluntarily entering the United States, because he was not arrested or "first brought" into the United States until after he had been indicted in the District of Columbia, venue was proper in the District of Columbia. *See* 18 U.S.C. § 3238[6]; *United States v. Catino*, 735 F.2d 718, 724 (2d Cir.

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[6] Section 3238 provides:

> The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such

1984); *United States v. Hsin-Yung*, 97 F. Supp. 2d 24, 28 (D.D.C. 2000); 2 CHARLES ALAN WRIGHT, FEDERAL PRACTICE & PROCEDURE § 304 (3d ed. 2000) (citing *United States v. Hilger*, 867 F.2d 566, 568 (9th Cir. 1989); *United States v. Layton*, 855 F.2d 1388, 1410-11 (9th Cir. 1988), *overruled by Guam v. Ignacio*, 10 F.3d 608, 612 n.2 (9th Cir. 1993)).

Accordingly, we affirm the judgment of conviction.

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offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one or two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

18 U.S.C. § 3238.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-3122 **September Term, 2006**

99cr00394-01

Filed On: March 8, 2007 [1027034]

United States of America,
Appellee

v.

Bernard Gurr,
Appellant

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-3122 **September Term, 2006**

99cr00394-01

Filed On: March 8, 2007 [1027035]

United States of America,
Appellee

v.

Bernard Gurr,
Appellant

BEFORE: Sentelle, Rogers, and Garland, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed January 22, 2007, and the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Michael C. McGrail
Deputy Clerk

APPENDIX C

Report on Proposed Rule Amendment Governing Searches of Property

The Advisory Committee on Criminal Rules of the Judicial Conference of the United States has considered amendments to the Federal Rule of Criminal Procedure 41(b) proposed by the Department of Justice. The proposed amendment authorizes a magistrate judge to issue a warrant for property that is within the jurisdiction of the United States, but outside any judicial district. The principal application of the proposed amendment is to cases in which the government seeks material located overseas in offices or residences associated with a U.S. Consulate or Embassy. This report deals only with the proposed amendment's separate application to American Samoa, a U.S. territory which has no federal district court (i.e., no judicial district).

The proposal states that a warrant may issue for property that is outside the jurisdiction of a state or judicial district if the property is within "1. a territory, possession, or commonwealth of the U.S." The proposed amendment grants authority to issue such a warrant to a magistrate judge "in any district in which activities related to the crime under investigation may have occurred, or *in the District of Columbia*." If adopted, a magistrate judge in the District of Columbia would have power to issue warrants for property in American Samoa.

The Advisory Committee on Criminal Rules requested, in a May 9, 2006 memorandum, that the Pacific Islands Committee of the Judicial Council of the Ninth Circuit comment on this proposed rule change. Subsequently, the Committee on Rules of Practice and Procedure approved publishing the proposed rule for public comment, but this version specifically excludes any application to American

Samoa. Nonetheless, the accompanying report will invite comment on the American Samoa issue. As indicated, our report focuses only on the proposed amendment as it relates to American Samoa. The "related properties" is an issue outside the area of the Committee's jurisdiction. The Pacific Islands Committee has been requested to make a recommendation to the Advisory Committee on Criminal Rules in preparation for the Advisory Committee's October 26-27, 2006 meeting.

I. American Samoa and the Application of Federal Criminal Laws

American Samoa is an unincorporated territory of the United States. 48 U.S.C. § 1661; *United States v. Standard Oil Co. of Cal.*, 404 U.S. 558, (1972). It is clear that federal crimes committed in American Samoa are subject to prosecution in United States federal courts. 18 U.S.C. § 5; *United States v. Lee*, 159 F. Supp. 2d 1241 (D. Haw. 2001).

Although federal courts have jurisdiction over crimes occurring in American Samoa, the appropriate venue for such prosecutions is far less clear. This problem arises because American Samoa has no federal district court, and is not part of any district court.[1] The prosecution of crimes is

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[1] Mr. Faleomavaega, American Samoa's delegate to Congress, introduced a bill in the 109th Congress, H.R. 4711, to create an Article I federal district court in American Samoa. In a March 16, 2006 press release, Mr. Faleomavaega announced that "as a result of recent Fono [the territorial legislature] Resolutions and opinions expressed by several traditional leaders opposing this legislation he will request the Chairman of the House Judiciary Committee not to conduct any hearings on H.R. 4711 at this time." *See* http://www.asbar.org. Mr. Faleomavaega also announced that he would request the GAO "to conduct a study of the judiciary system in American Samoa." *Id.* Consideration should be given by the Advisory Committee to await the GAO report before taking a position on this issue.

therefore governed by 18 U.S.C. § 3238, the extra-territorial venue statute, which provides:

> The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

The issue before us, however, does not deal with prosecution, but with the securing of warrants for property.

II. The Existing Law Regarding Authority to Issue Search Warrants

A. *The Federal Rule*

Federal Rule of Criminal Procedure 41(b) provides:

> (a) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:
>
> (1) a magistrate judge with authority in the district--or if none is reasonably available, a judge of a state court of record in the district--has authority to issue a warrant to search for and seize a person or property located within the district;
>
> (2) a magistrate judge with authority in the district has authority to issue a warrant for a person or

> property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed; and
>
> (3) a magistrate judge--in an investigation of domestic terrorism or international terrorism (as defined in 18 U.S.C. § 2331)--having authority in any district in which activities related to the terrorism may have occurred, may issue a warrant for a person or property within or outside that district.

Under the plain language of Rule 41(b)(1), the authority to issue a warrant is limited to "a person or property located within the district." Two limited exceptions exist under (b)(2) and (b)(3).

If no magistrate judge is reasonably available, Rule 41(b)(1) does permit a law enforcement officer to obtain a warrant from a "state court of record in the district." Federal Rule of Criminal Procedure 1 (b)(9) defines "state" as including any territory of the United States. But Rule 41 (b) requires that the state court judge be one "of record *in the district*." Because American Samoa is not in a district, the rule would not permit federal authorities, using Federal Rule of Criminal Procedure 41(b), to obtain a search warrant from a local court in American Samoa. *See United States v. Chipps*, 410 F.3d 438,446 (8th Cir. 2005) ("Interpreting 'district' to mean federal district throughout the rule ensures that, state judges and federal magistrates have the same territorial reach under Rule 41 (b)(1)").

Thus, it appears that the present version of Federal Rule of Criminal Procedure 41(b) does not authorize the issuance of a search warrant for property located in American Samoa other than in the two exceptions set forth in subsections (b)(2) and (b)(3). It is unclear if magistrate judges of the

District of Hawaii or the District of Columbia have issued such warrants.

B. The *American Samoa Rule*

Rule 41 of the Rules of Criminal Procedure of American Samoa provides:

> (a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a trial court judge or justice of the High Court upon request of an attorney for the government.
>
> (b) Property or Persons Which May Be Seized With A Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest-there is probable cause, or who is unlawfully restrained.
>
> (c) Issuance and Contents.

(1) Warrant upon Affidavit. A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the district court judge or, justice of the High Court and establishing the grounds for issuing the warrant. If the judge or justice is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property or persons to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in

part. Before ruling on a request for a warrant the judge or justice may require the affiant to appear personally and examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a marshal or police officer of American "Samoa. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a judge or justice to whom it shall be returned.

This provision tracks, in large part, the requirements set forth in Federal Rule of Criminal Procedure 4 1(b). Two differences appear obvious: 1) while the federal rule permits a warrant to issue on the request of an attorney for the government or a federal law enforcement officer, the American Samoa rule permits a warrant to issue only on the request of an attorney for the government; and 2) the American Samoa rule states that the warrant "shall be directed to a marshal or police officer of American Samoa." To obtain a search warrant in American Samoa, federal law enforcement officials would need to secure the assistance of an attorney for the government and a local marshal or police officer. "Attorney for the government," as used in the American Samoa rule, probably means an attorney for the territorial government.

III. The Pacific Islands Committee Review and Recommendation

The issues are whether there should be the ability of federal law enforcement officers to seek and obtain a warrant

for property in American Samoa upon probable cause and, if so, where the warrant should be issued.

The Pacific Islands Committee applauds the decision to exclude American Samoa from the proposed rule which will be circulated for comment. We believe that, the proposed rule essentially addresses a different problem that is inapplicable to American Samoa. The Committee believes that it would be more appropriate to address separately the issuance of warrants for property in American Samoa. The need asserted by the government for the rule amendment is national security concerns resulting from the selling of passports at overseas U.S. Embassies. There is no U.S. Embassy in American Samoa; and all passport applications from there are sent via the U.S. mail and processed in California.

The Pacific Islands Committee recognizes the need to clarify the authority to secure a warrant for property in American Samoa. Committee members have expressed concern over the perceived practice (although rare) of issuing warrants applicable to American Samoa in the District of Hawaii or elsewhere.

If a specific amendment to Rule 41 dealing with American Samoa alone is to be made, such an amendment should be reviewed first by the judiciary of American Samoa. This is consistent with a longstanding practice based on the original American Samoa-United States treaties. We suggest that any amendment affecting American Samoa should have the support of Chief Justice of the High Court of American Samoa. The Pacific Islands Committee would have difficulty supporting any rule change affecting American Samoa that is not supported by the American Samoa judiciary.

We recommend an amendment to Federal Rule of Criminal Procedure 41(b)(1) adding "or a High Court Justice in American Samoa" after the words "state court of record in the district," and add at the end "or in American Samoa for a warrant issued by the High Court." Thus, where there is no magistrate judge reasonably available (as in American Samoa), "a High Court Justice of American Samoa - has authority to issue a warrant...." This amendment would put the High Court of American Samoa in the same position as state judges of all 50 states when a magistrate judge is not reasonably available. It would also provide the government with easy access to an authorized court to secure probable cause search warrants, and provide the defendants with the opportunity to challenge warrants within the Territory.

IV. Recommendation

Our Committee recommends the change to Rule 41(b)(1) as outlined immediately above to provide authority to secure federal search warrants affecting search warrants for property in American Samoa. The issue should be revisited if congressional action is taken after the GAO study referred to in footnote one.

V. Process

The Pacific Islands Committee, under a different name, was formerly a committee of the Judicial Conference of the United States. Its duties were subsequently transferred to the Ninth Circuit and it now functions as a standing committee of the Judicial Council of the Ninth Circuit, with an indefinite liaison responsibility to the Judicial Conference of the United States Committee on Federal-State Jurisdiction.

We request the Judicial Council of the Ninth Circuit to forward our recommendation to the Advisory Committee on

Criminal Rules and the Committee on Federal-State Jurisdiction.

APPENDIX D

Department of Justice

FOR IMMEDIATE RELEASE
TUESDAY, OCTOBER 18, 2005
WWW.USDOJ.GOV

CRM
(202) 514-2008
TDD (202) 514-1888

DEFENDANTS SENTENCED IN CASES INVOLVING BRIBERY AND FRAUD SCHEMES IN AMERICAN SAMOA

WASHINGTON, D.C. - The former Director of the American Samoa Department of Education has been sentenced to 30 months in federal prison, and the former Director of the American Samoa Department of Health and Social Services has been sentenced to 15 months in federal prison, both on charges of conspiring to commit bribery and fraud concerning federal programs, Assistant Attorney General Alice S. Fisher of the Criminal Division announced today. "No public official is above the law," said Assistant Attorney General Fisher. "This case demonstrates the Department's determination to wipe out public corruption, and the great distance we will go to prosecute offenders in all states and U.S. Territories."

Kerisano Sili Sataua, former Director of the American Samoa Department of Education (ASDOE), was sentenced by the Honorable David Alan Ezra at U.S. District Court in Honolulu on Monday. In addition to the prison sentence and fine, Sataua was ordered to pay $61,000 restitution to the government of American Samoa. Sataua previously pleaded guilty to one count of conspiring to commit bribery and

fraud concerning federal programs, in violation of 18 U.S.C. § 371.

The charges against Sataua stem from his use of his official position to fraudulently award federally-funded ASDOE contracts in exchange for at least $9,000. Further, Sataua stole and misappropriated food and goods from the School Lunch Program that were supposed to have been used for feeding children in the American Samoa Public School System.

Patolo Mageo, former Director of the American Samoa Department of Health and Social Services (DHSS), was sentenced by the Honorable Helen Gillmor at U.S. District Court in Honolulu on Monday. In addition to the prison sentence and fine, Mageo was ordered to pay $41,000 restitution to the government of American Samoa. Mageo previously pleaded guilty to one count of conspiring to commit bribery and fraud concerning federal programs, in violation of 18 U.S.C. § 371.

The charges against Mageo stem from his role in a conspiracy to fraudulently award DHSS contracts. Mageo admitted that he defrauded the DHSS of at least $40,000 by fraudulently awarding several federally-funded construction contracts for the Women, Infants and Children government building and other contracts for DHSS. Mageo further admitted that he used his official position as Director to approve the fraudulent award of other federally-funded contracts in exchange for at least $10,000.

In a related case, on October 3, 2005, Fa'au Seumanutafa, the former Director of the American Samoa Department of Procurement, was sentenced by Judge Ezra to eight months in prison and a $5,000 fine, and ordered to pay $80,000 in restitution. Seumanutafa had previously pleaded guilty to one count of conspiring to commit bribery and fraud

concerning federal programs, in violation of 18 U.S.C. § 371. The charges against Seumanutafa stem from his role in a conspiracy to pre-set the prices on several federally-funded American Samoa Department of Education contracts for bookshelves and library furniture for American Samoa schools. Seumanutafa used his official position to approve and submit for payment from the American Samoa Department of the Treasury numerous false purchase orders for which he received at least thousands of dollars. In a related case, on October 6, 2005, Toetu Solaita, former Program Director of the American Samoa School Lunch Program, was sentenced by Judge Ezra to five years probation and 1,000 hours of community service and ordered to pay $68,000 in restitution. Solaita previously pleaded guilty in U.S. District Court for the District of Hawaii to one count of conspiring to commit fraud concerning federal programs, in violation of 18 U.S.C. § 371. The charges against Solaita stem from his role in a conspiracy to steal food and goods from the American Samoa School Lunch Program. Solaita admitted that he used his official position to approve his and his coconspirators' theft of food and goods purchased by the School Lunch Program that were supposed to have been used for feeding children in the American Samoa Public School System. According to the Federal Bureau of Investigation, the Seumanutafa, Solaita, Mageo, and Sataua prosecutions are the first public corruption cases to be prosecuted by federal officials for conduct in American Samoa.

These cases are being prosecuted by trial attorneys James A. Crowell IV and Daniel Schwager of the Public Integrity Section at the U.S. Department of Justice, Criminal Division-headed by Section Chief Noel L. Hillman-and investigated by the Honolulu Office of the FBI, the Department of Education Office of Inspector General, and the Department of Interior Office of Inspector General.

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05-553

U.S. Department of Justice

Federal Bureau of Investigation

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PRESS RELEASE

Charles L. Goodwin, Special Agent in Charge of the Federal Bureau of Investigation (FBI) at Honolulu, Hawaii, announced the arrest of Mika Kelemete, the former Warden for the Tafuna Correctional Facility (TCF) in American Samoa for violation of Title 18, United States Code, Section 242), "Deprivation of rights under color of law".

The FBI's Investigation has revealed that Kelemete directed officers from TCF to handcuff an inmate to a tent pole. Once the inmate was restrained, Kelemete struck the inmate with a wooden board on the head, neck, and upper back. After this beating, the inmate was placed in a maximum security cell and denied medical attention.

FBI agents executed an arrest warrant for Kelemete on February 12, 2006. Kelemete was transported to Honolulu, Hawaii to hear the charges against him. If convicted, Kelemete could face up to ten years in federal prison. The government of American Samoa was notified of Kelemete's arrest and is cooperating with federal authorities.

This case is being investigated by the Federal Bureau of Investigation and is being prosecuted by the United States Department of Justice and the United States Attorney's

Office for the District of Hawaii. The investigation is ongoing.

A criminal complaint is an accusation, founded upon probable cause determined by a federal judge. The defendant is presumed innocent unless and until proven guilty.